

SITE: Florida Phosphate
BREAK: 10.17
OTHER: V.I

Citizen Suits:

- §310 → any person can commence a civil action on his behalf (1) against any person who is in violation of any standard, regulation...(under CERCLA) or (2) against the President...where there is an alleged failure...to perform any act or duty (under CERCLA)..which is not discretionary
- Citizen suits that seek to challenge or enjoin an ongoing response action for not being protective are precluded under 113(h) → Did not find any successful challenges to EPA's remedy selected b/c it was not protective enough; majority barred by 113(h)
- Response action can be challenged after a stage has been completed...(rare)
- Frey v. EPA, 403 F.3d 828 (7th Cir. 2005)
 - o "Citizen environmental enforcement suit to enjoin on going violations of federal laws and to enjoin an on-going imminent and substantial endangerment to public health and env" (Frey's Brief for 7th Cir.)
 - o Partial excavation remedy selected by the EPA was challenged b/c EPA failed to bring site in compliance with CERCLA → still exposed to continuing releases of PCBs; not adequately controlling the releases of toxic chemicals
 - o Court held that the citizen suit could proceed "where there was only desultory testing and investigation process of indefinite duration" EPA failed to provide an objective referent to measure its progress in the cleanup → EPA can't point to ongoing testing, with no clear end in sight → need objective indicator that "allows for external evaluation, with reasonable target completion dates...to preclude a citizen suit" → case remanded
- Can have a citizen suit to request that EPA conduct a 5 year review in accordance with §121(c) b/c it's not a challenge to the response action
 - o M.R. (Vega Alta), Inc. v. Caribe General Electric Products, Inc., 31 F.Supp.2d 226 (D.P.R. 1998)
- Citizen suit claiming that the EPA wrongfully designated a site a "facility" and listed it improperly on CERCLIS was dismissed → this is not a "violation" under §310 → therefore a citizen cannot bring a citizen suit against the Administrator for refusing to delete a property from CERCLIS
 - o Battaglia v. Browner, 963 F.Supp. 689 (N.D. Ill. 1997)

EPA Duty under CERCLA:

- CERCLA requires the cleanup of hazardous substances only after the government has first issued a cleanup order. It appears that in the absence of prior government action, citizens may not be able to use the citizen suit provision to compel the cleanup of hazardous substances.

Jeffrey M. Gaba & Mary E. Kelly, The Citizen Suit Provision of CERCLA: A Sheep in Wolf's Clothing?, 43 Sw.L.J. 929, 937-40 (1990).

- CERCLA does not require the cleanup of hazardous substances, nor does it prohibit their release. Rather, CERCLA merely authorizes action, at one's discretion, when potentially responsible parties release hazardous substances.
- §310 authorizes actions against government to compel performance of nondiscretionary duties/mandatory duties → what's a mandatory duty?
- if the government must exercise its cleanup authority under 104 and 106 → then citizens can sue the government to undertake the cleanup or issue orders to compel a cleanup
- unlikely a court would find the government to have mandatory duties to act under 104 or 106
 - o 104 "authorized to act" in order to protect human health and the env
 - o 106 government "may" seek a court order or issue an admin order



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- 3112
3113
3114
- Neither says "shall" or "must" act
 - Mandatory would be statutory and regulatory requirements → NCP etc, once the cleanup has begun

Thompson v. Thomas, 680 F.Supp 1, 3 (D.D.C. 1987)

- Ps ask Court "to order the EPA to enforce the requirements of CERCLA against the landfill or to fund a private cleanup of the site."
- CERCLA §310 "only provides jurisdiction over suits to compel performance of mandatory duties" → court denied claim to compel enforcement action by EPA → found enforcement to be a nondiscretionary action
- "The Court concludes that even if the notice requirements were met under sec. 310(e) of the CERCLA, the plaintiffs' complaint would still fail to survive dismissal...Sec. 310 of CERCLA, like the citizen suit provision in RCRA, only provides jurisdiction over suits to compel performance of mandatory duties. Again plaintiff has stated no facts which would require the Court to find that the EPA has a mandatory duty to plaintiff under sec. 310 of CERCLA."

McCormick v. Anschutz Mining Corp., 1989 WL 88083 (E.D. Mo. 1989)

- P brought citizen suit against mining co under §310 and against EPA → alleged that "EPA is mandated to act when a violation is directed to its attention and a civil action will lie against the administrator to compel him to act"
- "But in a case involving the EPA's duty to investigate citizen complaints under a federal statute similar to CERCLA and SARA, the Eighth Circuit Court of Appeals reached a different conclusion. In Dubois v. Thomas, 820 F.2d 943 (8th Cir.1987), the Court upheld the EPA administrator's interpretation of the Federal Water Pollution Control Act that EPA had only a discretionary duty to investigate citizen complaints of FWPCA violations. Id. at 948-50."
- Court dismissed action and found that Ps had failed to allege any statutory violation by EPA b/c Ps did not identify any statutory provisions EPA Admin had violated or any provisions requiring specific action by EPA

Ehrlich v. Reno, 1994 WL 613698, 7 (E.D. Pa. 1994)

- "The decision of whether and when an agency must exercise its enforcement powers is left to agency discretion except to the extent determined by Congress. See Heckler v. Chaney, 470 U.S. 821 (1985); Harmon Cove Condominium Ass'n v. Marsh, 815 F.2d 949, 952-53 (3d Cir. 1987)."
- Court dismissed action for failure to state a claim → charge by recipient of §104(e) demand letter alleging that EPA "failed to perform its statutory duty by not bringing a cost recovery action against him or releasing him (from) PRP liability following his exoneration from state court"

Stewman v. Mid-South Wood Products of Mena, Inc., 784 F.Supp. 611, 616-7 (W.D.Ark. 1992)

- Property owners alleged that EPA's plan was inadequate, was negligently carried out, and did not prevent further contamination → District court had no power to order EPA to reopen its remedial activities at hazardous waste site with respect to acts that were discretionary with EPA
- "Relief was not available where Ps had sought order requiring EPA to reopen its remedial activities, b/c EPA's authority to conduct remedial action is permissive, not mandatory"
- "Finally, the EPA argues that the court lacks the power to order the EPA to reopen its remedial activities in relation to the site at issue, as the plaintiffs ask. The court agrees."

- "That statute allows citizens to sue the EPA for an "alleged ... failure ... to perform any act or duty [required by 42 U.S.C. §§ 9601-9675] ... which is not discretionary." ^{FN6} See 42 U.S.C. § 9659(a)(2). The relief available in suits of that type is an order to the EPA "to perform the act or duty concerned." See 42 U.S.C. § 9659(c)."
- "The EPA argues that nothing in the law requires it to take remedial action, i.e., that it is discretionary with the agency as to whether to act at all in relation to a particular site containing hazardous wastes. The EPA concludes, then, that the plaintiffs have failed to state a claim that would permit the court to grant this particular request. The court agrees"
- "The EPA's authority ^{FN7} to conduct remedial action in relation to a site containing hazardous wastes is specified in several provisions.
 - o Under 42 U.S.C. § 9604(a)(1), the EPA is "authorized to act ... and provide for remedial action." The statute also provides that "to the extent the [EPA] deems practicable," any removal action "should ... contribute to the efficient performance of any long term remedial action." See 42 U.S.C. § 9604(a)(2).
 - o The statute further provides that as to certain types of releases of hazardous wastes that are ordinarily excluded from the EPA's power to act, see 42 U.S.C. § 9604(a)(3), but that may be considered under emergency circumstances, the EPA "may respond." See 42 U.S.C. § 9604(a)(4)."
- "Other provisions state that the EPA "may require" the Attorney General to seek judicial relief "to abate [the] danger or threat" to "the public health or welfare or the environment" consequent to "an actual or threatened release of a hazardous substance" and "may" issue "such orders as may be necessary to protect public health and welfare and the environment." See 42 U.S.C. § 9606(a)."
- "As the EPA points out, all of this language is permissive, not mandatory. Regulations issued by the EPA specify the steps to be taken in response to a release or threatened release of hazardous wastes. See generally 40 C.F.R. §§ 300.400-300.435. Even those, however, state that in "determining the need for and in planning or undertaking ... [remedial] action, the [EPA] shall, to the extent practicable," do certain things. See 40 C.F.R. § 300.400(c)."
- "The regulations do specify that once a response is initiated, the EPA "shall" undertake certain tasks. See, e.g., 40 C.F.R. §§ 300.415, 300.420, 300.430, 300.435. The plaintiffs offer no specific allegations, however, of any required tasks not performed in the EPA's conduct of remedial action at the site in question."
- "Under these circumstances, the court holds that to the extent any review might be permissible, the plaintiffs have failed to state a claim. As to acts that are discretionary with the EPA, the court holds that it has no power to order the agency to reopen its remedial activities at the site. That claim is therefore dismissed with prejudice."

Dierker v. Clarke, 48 Fed.Appx. 267 (9th Cir. 2002)

- Dismissed §310 suit b/c appellants had failed to identify any non-discretionary duty or act that EPA allegedly failed to perform
- The district court properly dismissed CERCLA claims against the EPA "because appellants failed to identify any non-discretionary act or duty that the EPA allegedly failed to perform." See 42 U.S.C. § 9659(a) (authorizing citizen suits against the EPA administrator for failure to perform any act or duty which is not discretionary).

Consensus that Government Duty under CERCLA is discretionary → includes duty to take enforcement action, to investigate sites and choose remedies... Therefore, EPA cannot be compelled by courts to develop remedies or clean sites.

Natural Resource Damages under CERCLA: The Emerging Champion of Environmental Enforcement, 20 Pepp. L. Rev. 185, 194 (1992)

Protecting the Passaic: A Call to Citizen Action, 29 Seton Hall L. Rev. 76, 84-5 (1998)

Superfund's Second Master: The Uneasy Fit of Private Cost Recovery Within CERCLA, 6 St. Thomas L. Rev. 97, 122 (1993)

(“First, the United States consistently argues that the courts lack authority to compel EPA to develop remedies or to clean up a site. Where a governmental entity is acting in its “regulatory capacity” at a site, its suit under CERCLA does not subject it to liability. [FN158] Congress has not waived the sovereign immunity of the United States in such situations. [FN159] Under this view, the district court lacks authority to order EPA in its “regulatory capacity” to clean up a Superfund site. [FN160] In other words, the panel’s assumption that “the Hardage site would be cleaned up” without the HSC’s participation is not correct because EPA does not have to proceed.”)

[FN158]. Stilloe v. Almy Bros., 782 F. Supp. 731, 736 (N.D.N.Y. 1992).

[FN159]. In re Paoli Yard PCB Litig., 790 F. Supp. 94, 95-97 (E.D. Pa. 1992); United States v. Shaner, No. 85-1372 (E.D. Pa. June 15, 1992); United States v. Berks Assoc., 1992 WL 68346 (E.D. Pa. Apr. 1, 1992); United States v. Western Processing, 761 F. Supp. 725, 730 (W.D. Wash. 1991).

[FN160]. See generally 42 U.S.C. S 9604(a), (b); Heckler v. Chaney, 470 U.S. 821 (1985).